

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Eric R. Atkinson,

Plaintiff,

v.

Case No. 2:19-cv-2562

Muskingum County
Commissioners, et al.,

Defendants.

ORDER

This is an action filed pursuant to 42 U.S.C. §1983 by plaintiff Eric R. Atkinson, a pro se prisoner currently incarcerated at Noble Correctional Institution, against the Muskingum County Commissioners and various other defendants. Plaintiff's original complaint asserted two causes of action alleging that excessive force was used during his arrest, and that his medical needs were not adequately addressed following his arrest. Plaintiff filed an amended complaint on August 19, 2019, in which he asserted a third cause of action alleging that various defendants entered his residence without probable cause. In an order filed on December 13, 2019, this court granted defendants' motion to dismiss the third cause of action for lack of subject matter jurisdiction. See Doc. 21.

On December 17, 2019, the defendants moved to dismiss plaintiff's remaining causes of action with prejudice on the ground that plaintiff's application for leave to proceed without prepayment of fees was not truthful. See Doc. 22. On January 6, 2020, plaintiff filed a response in opposition to the motion. See Doc. 24. On January 13, 2020, plaintiff submitted a document which was captioned and docketed as a motion to amend defendants' motion

to dismiss. See Doc. 26. However, that document, with attachments, is essentially a further response to the defendants' motion to dismiss. On January 24, 2020, plaintiff filed an objection (Doc. 28) to the defendants' reply, which is basically a sur-reply.

On January 30, 2020, the magistrate judge filed a report and recommendation, in which she considered the defendants' motion to dismiss and all of the responses filed by plaintiff. She concluded that plaintiff's application for leave to proceed in forma pauperis was not truthful, as the application did not reveal that he was the owner of real property in Nashport, Ohio. She also noted that although plaintiff stated in his application that he had received \$200 in gifts within the past twelve months, he has since acknowledged that he receives \$200 per month from his parents. The magistrate judge recommended that this action be dismissed pursuant to 28 U.S.C. §1915(e)(2)(A), which provides that "the court shall dismiss the case at any time if the court determines that- (A) the allegation of poverty is untrue[.]" However, the magistrate judge further recommended that the dismissal should be without prejudice.

On February 10, 2020, plaintiff filed a response to the report and recommendation. See Doc. 30. Although this response was docketed as an objection, plaintiff in fact stated that he would not object to the dismissal of this case, and that he will refile the case immediately along with payment of the filing fee.

The court agrees with the report and recommendation (Doc. 29), and it is hereby adopted. The clerk is directed to terminate Doc. 26 as a motion. The motion to dismiss (Doc. 22) is granted in part, in that plaintiff's remaining first and second causes of action are

dismissed pursuant to 28 U.S.C. §1915(e)(2)(A), but the dismissal of those claims is without prejudice. The third cause of action is dismissed with prejudice for lack of subject matter jurisdiction pursuant to this court's order of December 13, 2019. The clerk shall enter judgment dismissing the first and second causes of action without prejudice, and the third cause of action with prejudice.

It is so ordered.

Date: February 24, 2020

s/James L. Graham
James L. Graham
United States District Judge